

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

11 NATHAN WALLACE,

12 Petitioner,

13 v.

14 L. SMALL, Warden

15 Respondent.

16 Civil No. 09-0372 L (WMC)

17 **ORDER DISMISSING CASE
18 WITHOUT PREJUDICE**

19 Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas
20 Corpus pursuant to 28 U.S.C. § 2254.

21 **FAILURE TO SATISFY FILING FEE REQUIREMENT**

22 Petitioner has failed to pay the \$5.00 filing fee and has failed to move to proceed in forma
23 pauperis. This Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or
24 qualified to proceed in forma pauperis. See Rule 3(a), 28 U.S.C. foll. § 2254.

25 **FAILURE TO STATE A COGNIZABLE FEDERAL CLAIM**

26 Additionally, in accordance with Rule 4 of the rules governing § 2254 cases, Petitioner
27 has failed to allege that his state court conviction or sentence violates the Constitution of the
28 United States.

29 Title 28, United States Code, § 2254(a), sets forth the following scope of review for
30 federal habeas corpus claims:

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The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a) (emphasis added). See Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir. 1991); Mannholt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988); Kealohapauole v. Shimoda, 800 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim under § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of a State court,” and that he is in custody in “violation of the Constitution or laws or treaties of the United States.” See 28 U.S.C. § 2254(a).

Here, Petitioner claims that he “is being duped out of his interest rate percentages the money in his account earns in breach of legal authority and the shareholder contract established by CDCR” and “CDCR stole Petitioner’s tax rebate checks sent to him by the IRS”. (Pet. at 5.) In no way does Petitioner claim he is “in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254.

Further, the Court notes that Petitioner cannot simply amend his Petition to state a federal habeas claim and then refile the amended petition in this case. He must exhaust state judicial remedies before bringing his claims via federal habeas. State prisoners who wish to challenge their state court conviction must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial remedies, a California state prisoner must present the California Supreme Court with a fair opportunity to rule on the merits of every issue raised in his or her federal habeas petition. See 28 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court judicial remedies a petitioner must allege, in state court, how one or more of his or her federal rights have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned: “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due

1 process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal
 2 court, but in state court.” Id. (emphasis added).

3 Additionally, the Court cautions Petitioner that under the Antiterrorism and Effective
 4 Death Penalty Act of 1996 (Act), signed into law on April 24, 1996, a one-year period of
 5 limitation shall apply to a petition for a writ of habeas corpus by a person in custody pursuant
 6 to the judgment of a State court. The limitation period shall run from the latest of:

7 (A) the date on which the judgment became final by the
 8 conclusion of direct review or the expiration of the time for seeking
 such review;

9 (B) the date on which the impediment to filing an application
 10 created by State action in violation of the Constitution or laws of the
 11 United States is removed, if the applicant was prevented from filing
 by such State action;

12 (C) the date on which the constitutional right asserted was
 13 initially recognized by the Supreme Court, if the right has been
 14 newly recognized by the Supreme Court and made retroactively
 15 applicable to cases on collateral review; or

16 (D) the date on which the factual predicate of the claim or
 17 claims presented could have been discovered through the exercise
 18 of due diligence.

19 28 U.S.C. § 2244(d)(1)(A)-(D) (West Supp. 2002).

20 The Court also notes that the statute of limitations does not run while a properly filed state
 21 habeas corpus petition is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003,
 22 1006 (9th Cir. 1999), cert. denied, 529 U.S. 1104 (2000). But see Artuz v. Bennett, 531 U.S. 4,
 23 8 (2000) (holding that “an application is ‘properly filed’ when its delivery and acceptance [by
 24 the appropriate court officer for placement into the record] are in compliance with the applicable
 25 laws and rules governing filings.”). However, absent some other basis for tolling, the statute of
 26 limitations does run while a federal habeas petition is pending. Duncan v. Walker, 533 U.S. 167,
 27 181-82 (2001).

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CONCLUSION AND ORDER

Accordingly, the Court **DISMISSES** the case without prejudice for Petitioner's failure to satisfy the filing fee requirement and state a cognizable federal claim. If Petitioner wishes to proceed with this case, he must submit, **no later than May 5, 2009**, a copy of this Order with the \$5.00 fee or with adequate proof of his inability to pay the fee AND a First Amended Petition which cures the pleading deficiencies noted above. **The Clerk of Court is directed to send a blank Southern District of California In Forma Pauperis Application to Petitioner and a blank First Amended Petition form along with a copy of this Order.**

IT IS SO ORDERED.

DATED: March 4, 2009

M. James Lorenz
M. James Lorenz
United States District Court Judge